United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B
P/S

75-2052

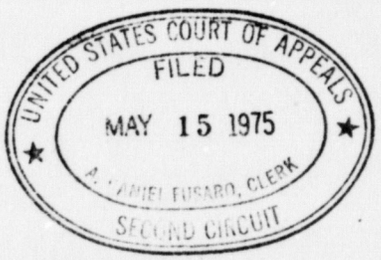
To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. CARL BUFORD, Relator-Appellant, -against- ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Respondent-Appellee.	Docket No. 75-2052

BRIEF FOR RELATOR-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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BRIEF FOR RELATOR-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether appellant was denied equal protection of the law and due process by being forced to proceed below without a copy of the State court trial record because of his indigence.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from an order of the United States District Court for the Southern District of New York (The Honorable Whitman Knapp) entered on November 4, 1975, denying, without a hearing, the pro se petition for writ of habeas corpus.

This Court granted a certificate of probable cause and leave to appeal in forma pauperis, and assigned Phylis Skloot Bamberger, The Federal Defender Appeals Unit of The Legal Aid Society, as counsel on appeal.

Statement of Facts

A. Prior Proceedings

Petitioner Buford was convicted on June 18, 1968, of murder in the second degree, after a jury trial in the County Court of Rockland County, New York (Gallucci, J.). This charge arose from the slaying of one Yvonne Dove, alleged to be petitioner's paramour, who was found dead in her apartment in Spring Valley, New York, on August 26, 1967. The trial lasted approximately three weeks. The State called thirteen witnesses on its direct case, and one on rebuttal; the defense called four witnesses and one surrebuttal witness. The transcript of the trial, which

does not include the minutes of a pre-trial suppression hearing, consists of approximately 3,000 pages. Petitioner is currently serving a sentence of twenty-five years to life at the Auburn Correctional Facility as a result of this conviction.

On appeal, his conviction was affirmed in a written opinion. People v. Buford, 37 A.D.2d 38, 324 N.Y.S.2d 100 (2d Dept., 1971). Leave to appeal to the New York Court of Appeals was subsequently denied on September 28, 1971.

B. The Present Petition

Petitioner, acting pro se, filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Southern District of New York on March 7, 1974, at which time he was granted leave to proceed in forma pauperis* pursuant to 28 U.S.C. §1915 (Pollack, J.). In the original petition, petitioner indicated that he was unable to set forth all relevant information concerning his claim because he did not have a copy of the trial transcript.**

The petition alleges seven separate grounds, all of which were raised in the New York State courts:

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*Document #1 to the Record on Appeal.

**See Petition at 19, Document #1 to the Record on Appeal, annexed as "B" to appellant's separate appendix.

Point I. "Did Admission of Evidence Not Directly Connected to Defendant Abuse Discretion of the Trial Court and Violate Defendant's Due Process and Equal Protection Rights Under the Fourteenth Amendment Through Prejudicial Errors Allowed."*

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*Under this vague and somewhat misleading caption, appellant specifically contended:

> (a) that it was improper to admit into evidence the fingernail scrapings obtained from him at the time of arrest since the prosecution was unable to establish that the scrapings were connected in any way with the deceased; and
>
> (b) that the introduction of fingernail scrapings obtained after his arrest but prior to the Miranda warnings was improper.

Appellant's citation in the petition to Davis v. Mississippi, 394 U.S. 721 (1969), coupled with the allegation that "Defendant was already under arrest because he was unable to leave the precinct...," suggests that petitioner also contends, as he did on his direct appeal, that he was taken into custody without probable cause and that the scrapings were therefore obtained during a period of unlawful detention, just as were the fingerprints in Davis v. Mississippi, supra.

Appellant also contended in his point:

> (c) that the fingernail scrapings obtained by the police having no special training or qualifications under conditions which were not conducive to proper laboratory analysis was a violation of due process;
>
> (d) that bits of teeth and hair, seized at the scene, were improperly admitted into evidence although not connected to either the deceased or appellant; and
>
> (d) that the prosecution failed to establish the corpus delecti or the cause of death.

Point II. "Defendant Was Deprived of His Constitutional Right of 'Reasonable Doubt' by the Use of Circumstantial Evidence as Factual Evidence?"*

Point III. "Did the Late Miranda Warning Violate Defendant's Constitutional Guarangees of Equal Protection of Law? Was the Manner in Which the Warning Was Given Sufficient for Defendant to Gain a Meaningful Understanding?"**

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*The gist of appellant's point here is that the circumstantial evidence was too tenuous and gave rise to inferences which were compatible with his innocence. The petition does not specify or discuss in detail particular evidence, however.

Also included within this point is appellant's complaint that the trial court failed to control adverse newspaper publicity, and that he was therefore deprived of a fair jury determination. The pretrial publicity issue was the only one which, in his opinion, Judge Knapp found not to have been exhausted in the State courts.

**Here appellant raises a question as to the adequacy of the Miranda warnings and whether the prosecution established a knowing and intelligent waiver. As in the prior points, the issue was discussed in vague terms, e.g., "Interrogation was begun by the investigator for the County Attorney with a hasty and lackadaisical warning to the defendant. Trial testimony does not show that the defendant understood or waived his rights. It is shown from the testimony that an attempt to hurriedly [sic] pressure defendant occurred and succeeded." (Emphasis in the original). This may be directly attributed to the fact that appellant had no copy of the suppression hearing transcript and/or trial minutes, and simply could not recall the substance of this testimony at his trial some six years earlier.

Point IV. "Did Pre-trial Suppression of Statements Favorable to Defendant Inhibit His Defense?"*

Point V. "Did Refusal to Strike People's Exhibit Deny Defendant Equal Protection Under Law and Violate His Due Process Rights?"**

Point VI. "Did Failure to Grant Motion for Dismissal Due to Failure of the Prosecution to Present a Prima Facie Case Harm Defendant's Equal Protection Status?"

Point VII. "Were Errors of Acceptance of the Appellate Court Harmful to Defendant's Due Process Rights?"***

Annexed to the petition for writ of habeas corpus was an "Affidavit [dated February 19, 1974] in Support of Motion Under 28 U.S.C.A. Sec. 2247, 2249"**** in which petitioner requested

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*Appellant here raises the failure of the prosecution to turn over a report prior to trial which appellant claims established (1) through an unidentified "colored boy" that the slaying was committed by a man named "Sinclair," and (2) that a police investigator, Sergeant Chous, had interviewed one Ina MacMillan, who stated that she saw the deceased drunk and bleading from the head in the early afternoon of the date of death. It was the prosecution's contention at trial that the head injuries suffered by the decedent were a factor contributing to her death.

**This point relates to the trial court's failure to strike from evidence those items which were admitted subject to connection and for which, appellant contends, there was no connection established. Here, too, appellant is vague and unspecific. In an attempt to cite to be precise, but without access to the trial transcript, appellant was reduced to referring the court to large portions of the trial record, e.g., "The trial testimony of Patrolman Ralph Krasson, pp. 522 through 631, and Charles McElroy, pp. 864 to 1210, showed that in fact these exhibits were not a part of the crime."

***This issue relates to the Appellate Division's acceptance of substitute photo exhibits as part of the record on appeal.

****The affidavit is Document #1 of the Record on Appeal.

that the Attorney General of the State of New York and/or the County Attorney of Rockland County produce the following documents related to his case:

1. Indictment #67-118
2. Transcript of Huntley hearing
3. Transcript of Grand Jury minutes in Indictment #67-118
4. Trial transcript with copies of all written motions attached
5. All statements taken by police and County Attorney's staff that were or could possibly be favorable to petitioner
6. Any copies of oral statements by the defendant (tapes, etc.)
7. Any copies of written statements by the defendant, signed or unsigned
8. Copies of appellate briefs of defendant and respondent, and opinion of the appellate court
9. Transcript of arraignment and sentence under Indictment #67-118
10. Medical Examiner's report: original and final.

The District Court did not rule on this application.

There followed a series of adjournments at the request of the office of the Attorney General of the State of New York in order properly to prepare its opposing papers.*

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*After the granting of the fourth extension, on July 9, 1974, petitioner moved for a default judgment under Rule 55 (b), Fed.R.Civ.Pro. This motion was denied by Judge Duffy on July 17. On July 18, Judge Duffy granted the state until August 30, 1974, to oppose the petition.

Finally, on August 30, 1974, the office of the Attorney General filed a six-page affidavit in opposition,* replete with references to pages of the original trial record, in an attempt to counter the allegations of appellant's petition.

Upon receipt of the State's opposing affidavit, petitioner renewed his earlier request for copies of the trial transcript, and requested thirty days from receipt of the transcript to file his reply.** In the affidavit in support of this motion, petitioner alleges, inter alia:

> Petitioner filed his habeas corpus motion with the Court without having a copy of the necessary transcripts. It is necessary for him to have said papers in order to reply to respondent's brief. Respondent has all the necessary papers to oppose petitioner's contentions. Petioner is suffering from a lack of reciprocal ability to oppose the answering brief. He also needs these transcripts to make any clarifications which the Court may require of his moving papers. The making of these papers available to petitioner will enable him to pursue his quest for legal justice in an adequate and presentable manner thus lessening the workload of the Court. See, Ellington v. Conboy, 459 F.2d 76 (1972); Townsend v. Sain, (1973) 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770; Love v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892; Byrd v. Dulton (1972) 405

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*The affidavit in opposition made reference to the Brief for Respondent, which was annexed as Exhibit A, and also to the decision of Judge Gallucci, dated April 10, 1968, on the pretrial motion to suppress evidence, which was annexed as Exhibit B. This affidavit in opposition is "C" to appellant's separate appendix.

**This motion, dated September 6, 19 , and entitled "Motion and Affidavit for Adjournment to Traverse Respondent's Brief," appears as Document #9 of the Record on Appeal.

U.S. 1, 92 S.Ct. 759, 30 L.Ed.2d 755; South v. Beto, 467 F.2d 1374; Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956).

This motion was denied by Judge Werker on September 19, 1974, "without prejudice to renewal at a later time upon greater showing of meritorious cause."*

On October 10, petitioner submitted a written reply to the State's opposition** which, by virtue of Judge Werker's order, was prepared from petitioner's recollection of the testimony at his trial, which had taken place six years earlier.

On October 30, 1974, for a third time petitioner requested that he be furnished with a copy of the trial transcripts, in addition to copies of the felony hearing minutes, the grand jury minutes,*** the autopsy reports, and appellate briefs. In his supporting affidavit, petitioner alleged that he was not

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*This order, denying petitioner's request for a copy of the transcript, is endorsed on the reverse of petitioner's supporting affidavit, which appears as Document #9 to the Record on Appeal.

**This reply, entitled "Traverse to Respondent's Opposition," is Document #10 to the Record on Appeal.

***The decision of Judge Gallucci, which the State annexed as "B" to its opposing affidavit, states, at page 2, that it was stipulated between the parties that the issue of suppression of tangible evidence would be decided on the minutes of the grand jury and the felony hearing and the testimony at the the hearing to suppress oral statements. The tangible evidence referred to includes the fingernail scrapings which petitioner claims were obtained in violation of his Fifth and Fourteenth Amendment rights. See, e.g., Point I(a)(b)(c) and Point III of the petition, annexed as "B" to appellant's separate appendix.

able" to traverse competently because of lack of the necessary transcripts on which the State had extensively relied in its opposing affidavit, and urgently requested "the necessary documented transcripts" to file " a supplemental brief more carefully clarifying his position at law. The making of these papers available will enable petitioner to present his facts to the Court in a more clarified and suitable manner."** Attached to petitioner's affidavit was a memorandum setting forth a total of eleven references to pages of the trial transcript which the State had made in its opposing affidavit.**

In response to this motion, on October 21, 1974, the State provided petitioner with copies of the fourteen pages to which it had referred in its opposing affidavit. The covering letter*** from the office of the Attorney General reads as follows:

> Dear Mr. Buford:
>
> In response to your recent motion for transcripts, our office is sending you copies of pages cited in our affidavit in opposition to your petition for a federal writ of habeas corpus. These pages -- as you listed them in your memorandum -- are

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*Affidavit of Carl Buford dated October 8, 1974, Document #12 to the Record on Appeal.

**Document #12 to the Record on Appeal.

***A copy of this letter was sent to the Pro Se Clerk of the District Court.

> as follows: 524, 559-560, 886, 888, 894, 953, 986, 941-942, 1609-1610, 1821, and 901. The 4000 page transcript which we have in our possession is on loan from the District Attorney's office.[*] We are not in a position either to send it on to you nor are we able to readily xerox something of that length. Nonetheless, perhaps the enclosed pages will be of some assistance to you.

On November 1, 1974, Judge Knapp summarily denied** the petition for writ of habeas corpus on the merits in a written opinion.*** Petitioner then commenced this appeal.****

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*Ms. Margery Reifler, the Deputy Attorney General assigned to this case, who wrote this letter, has informed appellant's counsel on appeal that the trial transcript had not been borrowed from the District Attorney, but rather had been subpoenaed by the State from the County Clerk's office.

**This denial was endorsed on the reverse of petitioner's motion papers (Document #12 to the Record on Appeal).

***This opinion is "D" to appellant's separate appendix.

****In addition to the notice of appeal from the order denying the petition, petitioner the same day filed a separate notice of appeal from the order denying his request for the trial transcript. In support of the issuance of a certificate of probable cause as to this issue, petitioner alleged, inter alia:

> "B. The State refused petitioner the record though this is a capital case and petitioner is serving a sentence whose maximum sentence is life.
>
> "C. The State though allowed the trial transcript to one Benjamin Seigal for the purpose of said transcript to author portions of the novel "The Jurors" (Copyright by Library of Congress in 1973) and using at times verbatim trial testimony, said novel being alleged to be fictional.

On this appeal the Office of the Attorney General has provided counsel with the trial transcript and with a copy of appellant's brief to the State courts on direct appeal of his conviction.

ARGUMENT

APPELLANT WAS DENIED EQUAL PROTECTION OF THE LAW AND DUE PROCESS BY BEING FORCED TO PROCEED BELOW WITHOUT A COPY OF THE STATE COURT TRIAL RECORD BECAUSE OF HIS INDIGENCE.

Throughout the course of the proceedings below, petitioner, who was an indigent pro se litigant, requested that he be supplied with a copy of the State court record so that he could adequately present his claims and counter the State's opposition. The State court trial which led to petitioner's conviction had occurred more than six years previously and had lasted more than three weeks. The trial record, which does not include the minutes of the suppression hearing, consists of approximately 3,000 pages. However, because petitioner was indigent and because he was not supplied with a copy of the record by the State, either voluntarily or pursuant to a court order, he was forced to rely on his independent recollection of the events at trial. This must be contrasted with the position of the State of New York which, by use of its subpoena power, obtained from the County Clerk a transcript of the trial and then used it extensively in the preparation of its papers.

The District Court then denied the petition for writ of habeas corpus on the merits without a hearing and without providing appellant with a copy of the State court record.

To state these facts is to state a violation of due process and equal protection of laws. Johnson v. Avery, 393 U.S.

367 (1969); Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington Board of Prison Terms & Paroles, 357 U.S. 214 (1958) (per curiam); Draper v. Washington, 372 U.S. 487 (1963); Williams v. Oklahoma City, 395 U.S. 458 (1969); Mayer v. City of Chicago, 404 U.S. 189 (1971); Lane v. Brown, 372 U.S. 477 (1963); Long v. District Court of Iowa, 385 U.S. 192 (1966); Gardner v. California, 393 U.S. 367 (1969); Wade v. Wilson, 396 U.S. 282 (1970); Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam); Britt v. North Carolina, 404 U.S. 226 (1971); Smith v. Bennett, 365 U.S. 708 (1967); Hardy v. United States, 375 U.S. 277 (1964); see also United States ex rel. Williams v. Zelker, 445 F.2d 451 (2d Cir. 1971); United States ex rel. Ellington v. Conboy, 459 F.2d 76 (2d Cir. 1972).

Appellant has a constitutional right to petition the Federal court for a writ of habeas corpus. United States Constitution, Amendment One, Section 9, Clause 2; Johnson v. Avery, supra, 393 U.S. at 485. Further, the Constitution and Title 28 U.S.C. §§1915 and 2254 permit any person, regardless of financial ability, in custody pursuant to a State court judgment of conviction, to enter the Federal court to seek relief. 28 U.S.C. §2254. This constitutional right being established, the Congress has nonetheless imposed collateral burdens of proof upon the petitioner in order to obtain counsel or ultimate success. 18 U.S.C. §3006(A); Johnson v. Avery, supra, 393 U.S. at 488; Townsend v. Sain, supra, 372 U.S. 293 (1972). It follows that if access to the Federal court is to have any

significance beyond merely a pro forma one, the petitioner must be given the tools with which to meet his burden. Johnson v. Avery, supra, 393 U.S. at 485.

Of course one of the most critical tools is the transcript upon which the petitioner bases his claims. Indeed, the Supreme Court has so stated in Gardner v. California, supra, 393 U.S. 367. In Gardner, the Court required the State to provide a State habeas corpus petitioner with a free copy of the transcript of the first and unsuccessful habeas corpus application for use in making a second application. Under California law, a habeas corpus petitioner was not afforded a direct appeal from a denial of the writ. However, he was permitted to file a petition in the intermediate appellate court, which constituded a new and separate proceeding. State law further required that the new petition contain a "brief statement" of what had occurred at the prior proceedings. California Penal Code, § 1475. This alone was held to be sufficient need for the requested transcript, and the State's failure to provide Wade with a free copy because of his lack of funds was held to be a denial of equal protection of the laws:

> It is argued that since petitioner attended the hearing in the Superior Court, he can draw on his memory in preparing his application to the appellate court. And that court, if troubled, can always obtain the transcript from the lower court. But we deal with an adversary system where the initiative rests with the moving party. Without a transcript the petitioner, as he prepared his application to the appellate court, would have only his own lay memory of what transpired before the

> Superior Court. For an adequate presentation of his case he would need the findings of the Superior Court and the evidence that had been weighed and rejected in order to present his case in the most favorable light. Certainly a lawyer, accustomed to precise points of law and nuances in testimony, would be lost without such a transcript, save perhaps for the unusual and exceptional case. The lawyer, having lost below, would be conscious of the skepticism that prevails above when a second hearing is sought and would as sorely need the transcript in petitioning for a hearing before the appellate court as he would if the merits of an appeal were at stake. A layman hence needs the transcript even more.
>
> Gardner v. California, supra, 393 U.S. at 369-370; footnotes omitted.

By granting at the outset petitioner's request to proceed in forma pauperis, the District Court recognized that petitioner was proceeding in good faith and sought to raise substantial and non-frivolous issues in this proceeding. Coppedge v. United States, 369 U.S. 438 (1962). Nevertheless, despite petitioner's numerous requests, the District Court refused to grant him access to the materials he needed to conduct his case effectively. The facts here show a far more compelling need for the State court record than was shown in Gardner. First, appellant was required to make detailed factual allegations relating to a trial which had taken place more than six years earlier and which consisted of a trial transcript of some 3,000 pages. Secondly, appellant had already initiated the proceeding here and was in obvious need of the State court record to pursue his claim effectively. The State had requested numerous ad-

journments in order to familiarize itself with petitioner's lengthy trial record. The State's opposing affidavit, in sharp contrast to petitioner's often vague and indefinite allegations, disputes petitioner's claims with precise allegations of fact and references to pages of the trial record.

Third, there is no indication in the record that the State court record was ever provided to the District Court,* and the opinion of that Court suggests that it reviewed only the papers submitted by the parties: "From the papers before us, it can hardly be said that the instant case is one which would meet the stringent totally devoid of evidence test enunciated in Thompson v. City of Louisville ..."** Appendix D at 2. What the Court stated in Gardner v. California, supra, 393 U.S. at

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*Title 28, U.S.C. §2254(e) provides that the applicant must produce that part of the State court record which he maintains establishes that the State court findings are insufficient. This section further provides that where an applicant is indigent, and for this reason is unable to produce the State court record, "the Federal court shall direct the State to do so." Pursuant to 28 U.S.C. §2250, at the District Court's direction an indigent applicant in a Federal habeas corpus proceeding is entitled to all documents on file with the Clerk of the District Court.

**It is difficult to understand how the District Court considered the merits of the issues presented in the petition without reference to the State court record:

> Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the State court record. The duty of the Federal District Court on habeas is no less exacting."
>
> Townsend v. Sain, supra, 372 U.S. at 316. Citations omitted.

369-370, applies here also. "For an effective presentation of his case, [petitioner] would need the findings of the Superior Court and the evidence that had been weighed and rejected." Id., at 369.

Further, several of the issues raised by petitioner relate to the suppression hearing. The State submitted Judge Gallucci's written opinion, and thus, under 28 U.S.C. §2254 (d),* the burden was on appellant to establish that "the State's factual determination is not fully supported by the record as a whole," or that the State court had not afforded him "a full and fair hearing." Townsend v. Sain, supra, 372 U.S. at 313. Without a copy of the State court record, including the minutes of the suppression hearing, it was impossible for appellant to sustain this burden. These minutes have never been available to anyone, and might never have

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*This section provides that "a determination on the merits of a factual issue, made by a State court, evidenced by a ... written opinion ... shall be presumed to be correct." 28 U.S.C. §2254(d). The provision goes on to place the primary burden on the applicant to establish one or more of the following: "(1) that the merits of the factual dispute were not resolved in the State court hearing; (2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; or ... (6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding."

been transcribed.*

Anticipating State reliance on Wade v. Wilson, supra, 396 U.S. 282, it must be stated that Wade is not applicable here. In Wade v. Wilson, California law provided that co-defendants on appeal should share a free copy of the transcript of their trial. Without deciding whether Wade was entitled to a free copy of the transcript to prepare a collateral attack, the Court vacated judgment and remanded to determine whether the co-defendant's copy of the record was available to the petitioner. The Court of Appeals for the Ninth Circuit, whose opinion was vacated by the Supreme Court, had held that an indigent state prisoner, absent a showing of need, was not entitled to a free transcript to search the record for some basis for post-conviction relief. Wilson v. Wade, 390 F.2d 632 (9th Cir. 1968). The Supreme Court left undecided whether an indigent state prisoner who has not formulated the precise errors in his State court conviction, must be provided with a free State court record of the original trial for use in a State collateral proceeding. Unlike the petitioner in Wade,

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*As reflected by one of the Deputy Attorney General's requests for adjournment, there may be some question as to the existence of the suppression hearing minutes. As the Court decided in Townsend v. Sain, "[I]f because no record can be obtained the District Judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one." Id., 372 U.S. at 313. In the event the suppression hearing portion of the trial transcript is not available, and it is unlikely that it is since several issues on the State appeal arose from the denial of this motion, then, under Townsend v. Sain, the District Court must conduct a new hearing.

appellant here has exhausted his State remedies on the substantive issues, and has set forth these issues as best he could without resort to the State court record, which he claims entitles him to Federal habeas corpus relief. Moreover, whereas the petitioner in Wade wanted the trial record to prepare a collateral attack in the State court, appellant here seeks the record to pursue effectively his habeas corpus proceeding already commenced in the Federal District Court.

In this case, petitioner was unable to respond to the State's answer by reference to parts of the record which favored his position. Nor was he able to show the defects in the analysis by the State court judge on the Fourth Amendment issues. Like the petitioners in United States ex rel. Williams v. Zelker,* supra, 445 F.2d 451, and United States ex rel. Ellington v. Conboy,** supra, 459 F.2d 76, appellant here needed the record to delineate his claims. Without it, he was doomed from the start to failure. Indeed, the State's use of the record demonstrates its critical importance, and it should have been supplied to petitioner. MacCollum v.

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*In United States ex rel. Williams v. Zelker, supra, this Court directed that the State supply a portion of the record at a prior mistrial in order to support the petitioner's claim of perjury at the second trial which resulted in his conviction.

**In United States ex rel. Ellington v. Conboy, supra, the petitioner was not afforded a copy of the State record in the Federal District Court. This Court reversed the District Court's denial of the writ of habeas corpus and remanded with instructions that the petitioner be granted a copy of the State court record and a de novo consideration on the merits.

United States, 511 F.2d 1116 (9th Cir. 1974).

CONCLUSION

For the foregoing reasons, the order of the District Court should be vacated and the case remanded with instructions that appellant be provided with a copy of the State court record.

Respectfully submitted,

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May 15, 1975

CERTIFICATL OF SERVICE

5/15/75, 19

I certify that a copy of this notice of motion and affidavit has been mailed to the Attorney General of the State of New York.

E. Thomas Boyle